Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	MM Docket No. 92-259
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

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SUMMARY

This proceeding is very complex containing many difficult yet important questions. The Community Antenna Television Association urges the Commission to take sufficient time to develop regulations that provide a fair and satisfactory implementation of the Congressional mandate to adopt must carry and retransmission consent rules. In particular it should recognize the disadvantaged bargaining position of small and more rural cable systems and establish a "cap" for them with regard to fees charged by broadcasters for retransmission consent. It also should adopt a broad definition of "market" as it relates to retransmission consent in order that consumers not be deprived of distant signals on cable systems. Finally, CATA urges that a broadcaster must be required to make a single selection per market regarding its must carry or retransmission election if the process is to be manageable.

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The Community Antenna Television Association, Inc., ("CATA"), is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 60 million cable television subscribers. CATA files these "Comments" on behalf of its members who will be directly affected by the Commission's action.

INTRODUCTION

Our approach to the proceeding herein, and virtually all others in this series is to work in close conjunction with the many other commenters to try to cover the vast amount of intellectual ground necessary to make some sense out of the myriad of rules and regulations required. We cannot and will not try to respond to all aspects of the rulemaking. Instead we will join with others, where appropriate, in reply comments on subjects of importance to us that are not highlighted here, or leave to other commenters we have already consulted the job of treating questions we do not address. Our particular interest here is to

focus on those key specific portions of the rulemaking that can make a significant difference to "smaller" system operators, or those outside the "core" market -- for it is those operators and their customers who could inadvertently suffer the most from the way these rules are presently being proposed.

This rulemaking proceeding is mandated by the 1992 Cable Act, and, as such, we recognize that the Commission is limited in what it can or cannot do or say. Thus, a few preliminary comments are required.

I. PRELIMINARY MATTERS

A. TAKE THE TIME TO GET IT RIGHT.

At the outset we congratulate the Commission and its staff for an almost exhaustive reading of the statute and its conversion into an almost inexhaustible series of questions. This is virtually the only thing the Commission could do given the nature of the new law. There are so many inconsistencies and clear areas where the drafters had less than full appreciation of the implications of what they were mandating that they have left the Commission in a conundrum.

It is CATA's hope that the Commission will have the fortitude to inform Congress if it finds that some of these inconsistencies or the practical effect of some of the new mandates is so draconian that they will have a significant negative effect on consumers and the potential for an advanced telecommunications structure that cable offers.

The Commission's responsibility is to effectuate the

provisions of the Cable Act. Of course, this obligation cannot be ignored. However, in this case it is increasingly clear from the tone of many of the rulemakings already issued by the Commission that there are many more complications and many more questions that the expert agency has found necessary to explore than the legal drafters seemed to have anticipated.

It is precisely because Congress leaves many of the actual regulatory tasks to the expert agency that the agency has a responsibility to go back to Congress and suggest, if it so finds, that some of the provisions of the law either will not work as intended or require more time to implement.

The issue of time implementation is certainly of immediate concern. It is no secret that the Commission staff has been stretched to its limits just to issue the massive number of rulemakings required by this new law in a time frame that will allow for publication, the receipt of comments and reply comments as required by the Administrative Procedure Act, and the promulgation of rules. It is also quite clear that the rulemakings do not, for the most part, propose specific rules or rulings for comment as is the normal case, but instead take a massive law and turn it into a massive set of questions -- more akin to a Notice of Inquiry.

This, in turn requires the various interested parties to attempt to digest and design responses to literally hundreds of complicated questions in a time frame that does not allow for thorough comment or analysis and to provide the help the Commission seeks. Again, CATA wishes to emphasize that it

recognizes the Commission has little, if any, discretion in this matter, and must make its "best effort" to initiate and conclude these rulemakings within the unrealistically short time frame mandated by Congress. All we can request is that if it is not really practical or possible to conclude extremely complicated proceedings such as the one herein, or on such formidable issues as rate regulation, both of which could have a profound, and possibly unintended effect on both the public and the telecommunications infrastructure that the Commission is in charge of promoting, then it would be prudent and fair to report back to Congress that it may be wise to allow more time to consider and analyze the myriad issues and implications of these rulemakings.

It should be noted that a delay in decisions on these issues is not particularly of benefit to CATA's members. The cable industry is presently at an extreme disadvantage because of the hiatus in knowing exactly what rules will govern the business we conduct. We are virtually foreclosed from adding or changing channel lineups awaiting a decision on the status of the "must carry" and "retransmission consent" rules, and we are in an absolutely no-win position on changing rate structures without knowing what the Commission's rules will ultimately look like.

However, it is also true that these decisions will have a very significant impact on not only our business, but on our subscribers and the very nature of the telecommunications structure as it applies to "multi-channel video distributors" in the future. Is 30 days for comment, and 15 days for reply comments in over a dozen nearly simultaneous rulemakings sufficient time

for the Commission to quickly digest -- as issues of first impression in the case of "retransmission consent" or cable rate regulation are, and then proclaim a set of rules by April? Can the Commission possibly acquire the information needed by an expert agency? If the answer is "no," then it is totally within the Commission's overall mandate -- and indeed it is the Commission's obligation -- to seek additional reasonable time from Congress. Again, we do not seek unnecessary delay. We seek reasonable, understandable, enforceable rules and regulations that serve their intended purpose without inadvertently penalizing the public or the industry.

B. CONSIDER THE SMALL BUSINESS IMPLICATIONS AND IMPACT

As the Commission is aware, much of the cable industry is made up of "small businesses." Close to 65% of all systems in the country have fewer than 1000 subscribers, yet they serve less than 4% of the subscribers in the nation. While many of these systems are multiply owned, the problems associated with any small business apply whether they are group owned or single entrepreneurships. In this rulemaking, for instance, small systems, unless the Commission accepts CATA's proposal herein to massively simplify the negotiating process for retransmission consent, will bear the brunt of immense transactional costs regarding negotiations with broadcast stations. Their small size and normally more rural location will also place them at a severe negotiating disadvantage.

We noted with almost fatalistic resignation the fact that

the Commission's "Initial Regulatory Flexibility Analysis" recognized no significant "reporting, record keeping and other compliance requirements," and with some consternation, the characterization that there are no "federal rules which overlap, duplicate or conflict with this rule." We presume this is because the rulemaking proceeding asked more questions than it proposed rules -- but the questions in many cases had precisely to do with the issue of overlapping (such as retransmission consent and compulsory license) or conflicting (such as retransmission consent and must carry program carriage obligation) rules.

We are NOT going to file a separate analysis under the Regulatory Flexibility Act rules. We are in direct contact with the Chief Counsel for Advocacy of the Small Business Administration and trust that his input to the Commission will be helpful. We cannot see the benefit to either our small business members or the Commission to initiate additional paperwork at this time. It has always been our experience that the Commission has been sensitive, where it could, to the particular problems of the smaller operators. In the context of both this rulemaking and the rate regulation rulemaking such sensitivity is even more necessary and is directly called for in the statute. We appreciate the Commission's receptiveness to the particular problems of small businesses in the telecommunications marketplace.

II. THE COMMISSION SHOULD ESTABLISH A "CAP" FOR RETRANSMISSION CONSENT FEES FOR SMALLER AND MORE RURAL CABLE OPERATORS

The Commission notes in paragraph 66 of this proceeding that it is required to consider the impact of retransmission consent on rates for the basic service tier "and to ensure that our ... regulations do not conflict with our ... obligation to ensure that the rates for the basic service tier are reasonable." It then goes on to conclude that the rate regulation proceeding will assure such reasonableness, so there is no need to take specific regulatory action in this proceeding. CATA respectfully disagrees.

Congress specifically added language regarding rate structures and effects of the retransmission consent section of the law recognizing that retransmission consent, if allowed to proceed unfettered, could result in excessive costs to consumers. This is particularly true in the smaller and more rural areas. The "considerable discretion" the Commission recognizes in paragraph 68, combined with the discretion to adopt regulations for the implementation of retransmission consent gives the Commission all the necessary tools to assure that smaller and more rural cable subscribers are not put into an unintended position of paying far more for "retransmission consent" signals than are others in the market.

A. SMALLER AND MORE RURAL CABLE SYSTEMS ARE AT A DISADVANTAGE WHEN NEGOTIATING FOR RETRANSMISSION CONSENT.

The problem is straightforward. In areas farther away than

a Grade B contour (or "35-mile zone") of a "local" (i.e., ADI according to the new law) broadcast station, the station is actually being significantly aided by the cable operator, and has been for many years. The broadcaster (assuming there are no translator stations, which would change this analysis) has relied on the cable operator to extend the broadcast signal. It has not expended capital to insure that all parts of its "service area" actually get the broadcast signal. Broadcasters have relied on cable operators and consumers to spend their own money to adequately extend the signal in a viewable form. The Areas of Dominant Influence (ADI) reflect the salutary effect of rural cable for broadcasters.

Now, however, the broadcaster, according to the proposed rules, can decide to charge for the carriage of the signal that the rural cable operator made valuable in the first place! Without the cable carriage over a period of years that ADI "market" may not have existed. It is the cable operator who has created a service that consumers rely on, and that service includes the carriage of the broadcast station. It is, and always has been an equal symbiotic relationship. If anything, at the inception of cable service, the broadcaster should have paid for carriage. The value of the extended ADI on ad revenue attests to the value delivered to the broadcaster by the cable carriage. The broadcaster has never paid for the service rendered. But now, having received the benefit of the service, the broadcaster is being put in a position to require payment by the rural cable operator! And the rural, smaller operator is in

no bargaining position.

Clearly in the core of the marketplace, where the broadcaster's signal is generally available, there is some bargaining position between the broadcaster and the cable system. Non-carriage (or, more accurately, the offering of an input selector switch option, just as is used for VCR/TV reception in the majority of homes in the United States today) is an alternative that can be offered by the cable operator should negotiations for "retransmission consent" not be successful. Such an option would not conflict with the findings of Congress that local broadcast television should be available to everyone in the local market.

But in an area outside the broadcaster's "Grade B contour" (or 35-mile zone) as defined by the Commission, now that the "market" has been vastly broadened by Congressional use of the "ADI," there will be many areas where "local" broadcast television is not, in fact, available to "local" viewers without their having to subsidize the broadcaster by paying extra fees for cable reception. Non-carriage for the local cable operator is not really an option since the broadcaster has not spent the time, money or effort to actually deliver his or her signal to the "local" market it claims, and is theoretically responsible for as a licensee.

The smaller system outside the Grade B contour cannot protect its subscribers from the potential of retransmission consent rate gouging. While it may be true that larger systems in the same circumstance could at least threaten to have an impact on advertising revenue of the broadcast signal if they chose not to

agree to terms demanded, that same impact is not present for a smaller operator. At the same time the cost of negotiation for the smaller system is higher since transactionally there are far more small systems on the periphery of the market in most cases than there are large central systems. The result is that rural, smaller systems and their subscribers could wind up unfairly paying a significantly higher percentage of their revenue for "local" broadcast signals than others in the market. If the Commission fairly treats this issue in its ratemaking proceeding, as it suggested, it would do so by allocating the cost of the "retransmission consent" signals, or treating those costs in the overall analysis of the "reasonable profit" of the cable system. But in either case the smaller, rural cable subscriber would unfairly suffer since either their rates would be ("justifiably") higher, since retransmission consent costs were higher, or the cable system would have more of its "reasonable rate" assigned to retransmission consent which would in turn adversely affect its ability to deliver other programs or service. Neither is a fair result just because the system happens to be small and outside the Grade B contour of a broadcast station that did not expend its own capital to actually serve the "market" it now claims as its own.

B. "CAPS" ON RETRANSMISSION CONSENT FEES WOULD PROVIDE A WORKABLE SOLUTION

CATA proposes the following solution to this problem. We believe it is well within the Commission's power to adopt specific regulations with regard to the rates or methodology of negoti-

ations for retransmission consent, and we believe, contrary to the Commission's initial tentative conclusion, that such a methodology is necessary within the context of this rulemaking rather than relying solely on the rate regulation rulemaking.

First, require that any and all retransmission consent agreements between broadcasters and cable operators in a market be made a matter of public record. If "free tv" is now going to derive payments for the right of some to see its signals, then everyone should know about it. Second, mandate that should a broadcaster choose to impose "retransmission consent" requirements, cable systems with 3500 or fewer subscribers, where any portion of the system is outside the predicted "Grade B contour" of the broadcaster (or 35-mile zone if the Commission chooses this simpler approach, as it did in its 1972 rules), may, at its discretion simply choose to pay a retransmission consent fee equal to the highest fee paid by a cable system within the broadcaster's "city grade" contour as defined by the Commission.

It also should adopt a similar cap for small systems located wholly within the market. Such a fee would reflect the true equal bargaining power of larger systems in the core of the service area of the broadcaster. The broadcaster will have neither undue negotiating power against a much smaller entity nor will it derive unfair advantage from the fact that it chose for many years not to extend its signal with its own capital to serve the "local" viewers it has a licensee's obligation to serve. This will prevent the broadcaster from using undue market bargaining power to derive uncompensated benefit from the cable

system which in effect extended the broadcaster's market. It permits the broadcaster to receive "retransmission consent" fees via regulations that at the same time guarantee against undue and unreasonable fees for basic service as the Commission is instructed to assure. It also has the effect of potentially lessening administrative and paperwork costs for smaller systems since extended "negotiations" are thus avoidable.

Of course, this proposal is designed to be optional on the part of the smaller, rural operator. If it so chooses, it would still be able to enter negotiations with the broadcaster and either agree on some other consent arrangement, or decide not to carry the signal. This is particularly important in more rural areas since in most cases they are "between markets" in the sense that there are other signals available, and nonduplication and syndicated exclusivity restrictions, appropriately, do not apply. Thus the operator could heed the interests of the local viewers and choose to carry some non-ADI signals, or seek to modify its ADI designation as contemplated by the rules.

C. NONDUPLICATION AND EXCLUSIVITY ZONES SHOULD NOT BE EXPANDED

Consistent with this position, and in response to the Commission's open inquiry on whether the nonduplication and exclusivity zones should be expanded, our response is a definite no. To do so would put viewers in many areas of the country in the impossible situation of having to watch channels they could not receive but receiving other channels that are then blacked

out! This is one of the anomalies of Congress' ad hoc decision to use an "ADI" market designation instead of the far more carefully thought-out market designations the Commission has used since 1972. There is no legislative history regarding the selection of ADI markets as there were no hearings on the issue.

III. THE COMMISSION'S RETRANSMISSION RULES SHOULD ASSURE THAT CONSUMERS NOT BE DEPRIVED OF PROGRAMMING THEY HAVE BEEN SEEING FOR YEARS.

The complex interplay between "must carry" and "retransmission consent" belies the Commission's suggestion that the two are totally severable. CATA does not intend to argue that issue here. Indeed, we will not spend much time discussing the finer points of the "must carry" proposals at all since we firmly believe that entire section of the law will be found unconstitutional as it has been twice before. We would rather focus on the realities cable operators, broadcasters, and the Commission are actually going to face. There is a far greater likelihood that retransmission consent will exist on its own, or that both signal carriage provisions will be dropped from the law than there is that they will all have to be interpreted in their present form.

With that in mind, we respectfully suggest to the Commission that it has the unenviable task of trying to make a structure work that is inherently unstable. Certain fictions will have to be indulged in, or great liberties taken in order to make sense of the retransmission consent provisions.

A. RETRANSMISSION CONSENT RULES COULD LEAD TO THE ELIMINATION OF "DISTANT SIGNALS" ON CABLE SYSTEMS

We start with the premise, not denied anywhere in the legislative history, that Congress had no intention of creating a situation where millions of cable television viewers, and particularly more rural viewers, would lose the ability to see the broadcast signals they have been watching on their cable systems for years. If the Commission follows its current thinking, as reflected in the Notice of Proposed Rulemaking, that could very well be the result.

On the one hand, the Commission has tentatively decided that contractual agreements between programmers (and potentially network affiliation agreements as well) and broadcasters can supersede the rights created for the broadcasters in Section 325 (b) (1) (A). On the other, there is the presumption that Congress did not mean to black out a substantial amount of the programming seen by rural Americans on cable. If there already are a substantial number of contractual agreements, both with programmers and with networks that prevent the granting of retransmission consent outside the "market" -- which in this case we understand to mean the ADI, then almost all rural systems will be unable to get retransmission consent for a majority of the signals they are now carrying. This will lead to chaos.

The Commission is well aware, as Congress apparently was not, that broadcast signal propagation makes cross-market viewership, particularly in areas between two markets, it common. Yet at the same time, ADI market designations are on a county by county basis and are artificially "exclusive" for accounting

purposes (to aid in the sale of advertising) to a given county. Thus there are innumerable situations in this country where there are cable systems delivering to subscribers signals from more than one ADI market. Again, this is particularly true not in the core city areas, but in the more rural areas where there are a predominance of small systems.

CATA believes it was an error that the Commission did not seek information on how many contracts now exist between broadcasters and program suppliers, or networks which would effectively prohibit those broadcasters from granting retransmission consent outside their "ADI market." Without that information, the Commission cannot make a reasoned judgment on the effect of any of its proposed decisions in this area. This is one of the reasons that CATA cited earlier as potential justification to return to Congress and seek additional time to study fully the implications of these rules before prematurely and arbitrarily putting them into effect without any real notion of whether they even serve the intent of Congress, let alone do serious harm to the American public.

If the Commission adopts a rule that interprets retransmission consent to be subject to contractual limitations, and those limitations are already in existence or are extensively adopted subsequent to the Commission ruling, then, in effect, the Commission has interpreted retransmission consent as a mechanism whereby Congress decided to eliminate the carriage of "distant signals" by cable systems. We do not believe that was the intent of Congress, nor do we believe Congress envisioned such a result.

Thus the Commission should look at alternatives to assure that such a result does not occur.

B. ALTERNATIVE SOLUTIONS ALLOW FOR THE AVAILABILITY OF DISTANT SIGNALS

One such alternative is to reach the opposite conclusion with regard to the power of programmers over the permission granted to a broadcaster. That is, for the purposes of these rules, as the broadcasters vociferously argued throughout the Congressional debate, "retransmission consent" has nothing to do with the programming on the signal -- that is controlled by another law: compulsory license. Instead, retransmission consent relates solely to the "signal" and the power of the broadcaster to either grant or not grant retransmission consent cannot be foreclosed by contractual restrictions by program owners or distributors. At least in that situation the broadcaster has the power to grant such consent across the artificial ADI boundaries as opposed to the situation where they do not, even if they want to.

Another alternative is to take an opposite interpretation of the need for retransmission consent outside the "market". Since a broadcaster is only licensed "rights" to serve its own market (as defined by the Commission's broadcast license rules), then whatever a cable operator receives and uses outside that market should not be controlled by that broadcaster. In other words, the fact that a broadcaster controls its signal in the New York market does not mean that it controls that signal wherever the

laws of propagation happen to take it.

Interpreting the law in that way would allow for required consent for a cable operator to carry a broadcast signal in the market of license, but would allow the compulsory license to work elsewhere, thus allowing distant signal carriage without the limitation of contractual restrictions.

C. RULE CHANGES WILL BE NEEDED IF RETRANSMISSION CONSENT IS TO WORK

In either case, in response to another of the many questions posed in the Notice, the Commission, in CATA's view, will have to alter the definitions in Section 76.62 of the rules regarding the manner of carriage of signals pursuant to retransmission consent. While the Commission has tentatively suggested that these provisions need not be modified, CATA respectfully points out that the numerous variations that could conceivably result from retransmission consent negotiations are not contemplated by the current definitions. For instance, the broadcasters spent the last several years arguing in Congress for the right to impose retransmission consent on the grounds that cable was already paying, in essence, the same sort of fees for the popular cable programming offered by such purveyors as ESPN, USA, TNT, etc. They repeatedly pointed out that cable operators pay a per subscriber fee to carry those programmers' channels, and that broadcasters wanted the same right. What they neglected to mention was that in all the above-cited cases, the programmer allows, as part of the fee structure, the cable operator to insert local advertising in the program feed.

CATA maintains that this type of relationship is a clear likelihood under the new retransmission consent regime. Thus, the Commission's definitions, whatever they might be, must be designed to accommodate agreements between cable operators and broadcasters that include partial carriage of the signal, or periodic interruption of the signal. Remember that under the new scheme, retransmission consent is NOT for the carriage of programming, it is for the carriage of a "signal". The programming is carried, according to the broadcaster's own arguments, pursuant to the compulsory license. Indeed, without the compulsory license it is unlikely that retransmission consent would be workable at all.

If, as in one of the scenarios outlined by the Commission, a programmer does have rights that supersede the broadcasters', with regard to retransmission consent, and only some programmers avail themselves of the opportunity to block retransmission of their particular programs, it is easily foreseeable that a cable operator and a broadcast station would be forced to come to some carriage agreement that contemplated excision of some programming. Not only should this be allowed under the Commission's definitions, should it also conclude that programmers have such superseding rights, it is the only way retransmission consent could work. Certainly the Commission would not want to put itself in the position of saying that any one syndicator of a program on a broadcast station could have the power, by superseding the broadcaster's right to grant retransmission consent to that one program, to eliminate the possibility of retransmission

of the remainder of the program day!

In view of all these twists and turns, CATA suggests that if the Commission adopts the view that Congress intended for retransmission consent to work not only in the local market but in "distant" markets as well, the Commission really has only two options: either change its position on the ability of programmers to contractually defeat retransmission consent, or change the definition of market to maximize the ability to grant such consent.

This could be done as outlined above, to distinguish the rights of a broadcaster inside and outside the market with regard to its control over the signal. A more logical approach, however, would be to expand the definition of the market within which the broadcaster could grant retransmission consent without running afoul of the distant signal problems enumerated herein.

CATA recommends that the market should include not only the ADI, but all "significantly viewed" signals under the Commission's current definitions, as well as all areas within the Grade B contour and the Commission's former 35/55 mile zones. An alternative would simply be to use the power the Commission has to expand the definition of ADI market or markets to include all those areas where a cable system currently carries the broadcast station. This, in essence, would be a form of grandfathering that would allow the station and the system to continue to conduct retransmission consent negotiations without the intervening complication of whether a broadcaster has the power to grant such consent outside its market.

D. CATA URGES ADOPTION OF AN EXPANSIVE "MARKET" DEFINITION

Put simply, if the Commission wishes to effectuate what appears to be the intent of Congress, as well, as protecting the viewing rights and habits of consumers in smaller, more rural areas that are typically between two markets, it must either prevent the broadcaster from being limited in its negotiations by programmers or expand the definition of market to assure that the limitations are reduced to a minimum. Of the two alternatives CATA respectfully urges the second: an expansive market definition. We caution the Commission to include such an expansive definition in the rules directly relating to retransmission consent since we still believe there is a high likelihood that those rules associated with the must carry provisions will not survive constitutional challenge.

It is, of course, true that the Congressional discussion of market and ADI is in Section 614 of the rules relating to mandatory carriage of commercial broadcast signals. This reinforces CATA's stated view, contrary to the Commission position, that the two sections, mandatory carriage and retransmission consent, are not severable and are, in fact, only understandable and even marginally workable if taken as a whole. The foregoing discussion, we believe, makes it clear that retransmission consent cannot possibly work without an expansive and clear definition of market.

IV. TO MAINTAIN ANY SEMBLANCE OF CONSTITUTIONAL CONSISTENCY BROADCASTERS MUST CHOOSE "RETRANSMISSION CONSENT" OR "MUST CARRY" ON A MARKET-WIDE BASIS.

As Commissioner Quello has made clear in his additional statement attached to this proceeding, it is his intention, and presumably the Commission's to once again stoutly defend the concept of must carry against constitutional challenge. The Commissioner notes that the congressional findings in the law should make this third effort at such a defense more effective than the last two. But one of the assumptions the Commission tentatively adopts without question in this rulemaking totally undermines the constitutional rationale supporting those must carry rules.

The Congressional findings go through an extensive list of the benefits brought about by local broadcasters that justify an impingement on the First Amendment rights of cable operators in order to effectuate the governmental interest in preserving local broadcasting and making sure such broadcasting is available to all people in the local community. The theory is then spun that lack of carriage causes great harm to broadcasters, or even the threat of future lack of carriage since viewers predominantly watch television via cable. The option or viability of input selectors is summarily dismissed although a larger majority of viewers use those switches today in the form of VCR/TV switches than subscribe to cable television!

A great leap of faith is then taken that says even though SOME broadcasters may need the sanctuary of "must carry" to protect their viability (which, again, is the governmental inter-

est that supports this First Amendment intrusion) OTHERS, who have market power, do not need such protection and can proceed to dispense with such extraordinary protection in favor of their own market force to seek remuneration in some form for the carriage of their signals. Should the broadcaster make such a decision, it would clearly be overriding the governmental conclusion that protection is necessary for the broadcaster's survival in its market.

If the Commission's initial interpretation of the law is correct, that broadcasters select either retransmission consent or must carry status on a system by system basis rather than a geographical basis that encompasses the entire market, the rationale that must carry is necessary to protect a governmental interest instantly fails since the government has ceded that decision to a private party! What's worse, the private party can make the decision regarding the necessity of protection to assure its existence in the market on a jurisdiction by jurisdiction basis! In other words, it could be a "justifiable" constitutional intrusion for the government to require carriage of Channel 9 in Alexandria, but Channel 9 could choose NOT to be carried (by refusing terms for retransmission consent) in Arlington and that would not interfere with the "rights" Congress said it was trying to protect by instituting the must carry rules.

CATA respectfully suggests to the Commission that it cannot have it both ways. If the Commission is to defend the Congressional logic of the must carry rules then it cannot also interpret the retransmission consent rules to apply on anything